VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Ch. 151

Re*:* Eric and Geraldine Cota Declaratory Ruling # 425

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Eric and Geraldine Cota (Petitioners) filed this Petition for Declaratory Ruling concerning a landscaping and excavation business in Montgomery, Vermont. As set forth below, the Board concludes that an Act 250 permit is required.

I. PROCEDURAL HISTORY

The District 6 Environmental Commission Coordinator (Coordinator) issued Jurisdictional Opinion # 2003-03 on July 28, 2003, and Reconsidered Jurisdictional Opinion #2003-03 on September 22, 2003 (JOs), in which he determined that the construction of improvements to a landscaping and excavation business in Montgomery, Vermont (Project) constitute a development and require a permit pursuant to 10 V.S.A. Ch. 151 (Act 250).

On October 17, 2003, Petitioners filed a Petition for Declaratory Ruling with the Environmental Board (Board), appealing the JOs pursuant to 10 V.S.A. § 6007(c). The Petitioners contend that the Project does not require an Act 250 permit.

On November 25, 2003, Board Chair Patricia Moulton Powden convened a Prehearing Conference with the following participants:

Petitioners, by Joseph F. Cahill, Jr., Esq. and Megan Manahan, Esq.
Michaela Ledden, by Pamela A Moreau, Esq.

A Prehearing Conference Report and Order (PCRO) was issued the same day. Among other things, the PCRO identified parties and issues, and scheduled the case for hearing.

On February 13, 2004, the Chair issued an Order granting the parties' stipulation to continue the case to allow time for mediation. On March 15, 2004, the Chair issued a Continuance Order granting a motion to continue the case due to an unforeseen medical problem of one of the parties. On August 10, 2004, the Chair issued an Order Regarding Stipulation, canceling a status conference and extending the prefiling deadlines and hearing date.

On December 1, 2004, the Board conducted a site visit and convened a public hearing in this case. At the hearing, the parties' were given an opportunity to file supplemental proposed findings and conclusions on or before December 22, 2004. The Board deliberated immediately after the hearing and again on February 2, 2005. Based upon a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the

Board declared the record complete and adjourned.

II. ISSUE

The merits issue is whether the Project requires a land use permit pursuant to Act 250. This includes the subissue of whether the Project constitutes "farming" pursuant to 10 V.S.A.§ 6001(22), which is exempt from Act 250 regulation under 10 V.S.A.§ 6001(3)(D), and the subissue of whether use of the Project tract for the excavation business constitutes "development" pursuant to 10 V.S.A. § 6001(3)(A).

III. FINDINGS OF FACT

To the extent that any proposed findings of fact are included herein, they are granted; otherwise, they are denied. *See Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-242 (1997*); Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983). Topic headings are only for organizational purposes. Facts stated and terms defined in the procedural summary are incorporated herein.

1. Petitioners own two adjacent parcels of land in Montgomery Center, Vermont. They acquired the first parcel for their primary residence in 1972. It is approximately .75 acres in area. They acquired the second parcel, which is approximately 16 acres in area, in 1988.

2. Since acquiring the 16-acre parcel, Petitioners have cleared and graded it and put gravel down on the land to make a workable surface, and erected various buildings and structures on the parcel. Petitioners also have used the parcel to grow Christmas trees, pumpkins, and other fruits and vegetables. The land and improvements have been used for Petitioners' nursery and excavation businesses, as set forth below.

3. Geraldine "Jo" Cota owns Cota's Nursery, which has been in operation since 1990. Petitioners built two greenhouses, and a half greenhouse attached to the office building, on the 16-acre parcel for Cota's Nursery. These structures are used for the nursery business.

4. Eric Cota started his own excavation and landscaping business, Eric's Excavation and Finish Landscaping, on a part-time basis in 1987, and went into the business full time in 1991. In this business, Mr. Cota constructs driveways, cellar holes, septic systems, and puts in gravel, sand and topsoil for customers.

5. Petitioners also use the 16-acre parcel to store gravel, sand and topsoil, and to sift materials with two metal "grizzlies." One of the grizzlies is used primarily for gravel; the other is used primarily for sand. The grizzlies are portable.

6. Petitioners built a steel-frame garage on the 16-acre parcel in 2000. It is used primarily to store and maintain vehicles and equipment for the excavation and landscaping business. This garage is also used at times for storage for the nursery business, and for Petitioners' personal vehicles.

7. Petitioners erected a pole barn on the 16-acre parcel in 2001, with 3 walls, a roof, and several partial, internal walls that separate it into five storage bays. The pole barn is used to store materials and equipment for the nursery business, including loose topsoil (some of which was taken from the Project site), loose mulch, bagged peat moss, bagged cow manure compost and mulch, and a mulcher. It is also used at times to store personal materials belonging to Petitioners, and at times to store materials for the excavation and landscaping business.

8. There is a sign on the 16-acre parcel, along the road, advertising both businesses. The top half of the sign says "Cota's Nursery," at the top, with the words "annuals perennials trees shrubs" beneath it. The bottom half of the sign says "Eric's Excavation and finish landscaping."

9. The town of Montgomery has not adopted zoning and subdivision regulations.

IV. CONCLUSIONS OF LAW

The Petitioners own and operate a nursery and excavation business on approximately 17 acres in Montgomery Center, Vermont. Petitioners have built five buildings since 1988: two and a half greenhouses, a steel-frame garage, and a pole barn. The greenhouses are used for the nursery business, and are exempt from Act 250 as "farming," which is defined to include the operation of greenhouses. The focus of this case, therefore, is whether construction of the garage or the pole barn constitutes "construction of improvements" for a commercial purpose, thus triggering Act 250 jurisdiction.

An Act 250 permit is required for "development," as defined by the act. 10 V.S.A. § 6081(a)(development requires a permit); 10 V.S.A. § 6001(3)(A)(defining "development"). "Development" is defined, in relevant part, to include the "construction of improvements . . . for commercial or industrial purposes." 10 V.S.A. § 6001(3)(A). Act 250 expressly exempts the construction of

improvements for farming purposes from the definition of development. *Id.* § 6001(3)(D)(i). Thus, construction of improvements for farming purposes would not trigger the permit requirement.

A. Construction of Improvements for Farming

Petitioners argue that the greenhouses and the pole barn do not constitute development because they fall within the definition of "farming."

> (A) the cultivation or other use of land for growing food, fiber, Christmas trees, maple sap, or horticultural and orchard crops; or
> * * *
> (C) the operation of greenhouses; or
> * * *
> (D) the on-site storage, preparation and sale of agricultural products principally produced on the farm.

10 V.S.A. § 6001(22). Petitioners bear the burden of proving that their activities are exempt as farming. *Re: Richard and Marion Josselyn*, Declaratory Ruling #333, Findings of Fact, Conclusions of Law, and Order at 6 (Feb. 28, 1997).

In this case, there is no question that the greenhouses were built for "farming" purposes. 10 V.S.A. § 6001(22)(C)(defining "farming" to include the operation of greenhouses). Therefore, these structures do not trigger Act 250 jurisdiction. Petitioners do not argue that the steel-frame garage was built for farming purposes, and the Board concludes that it was not, as discussed below. Because the Board concludes that construction of the garage in 2000 triggered Act 250 jurisdiction, there is no need to address the issue of the pole barn, which was built in 2001.

B. Construction of Improvements for a Commercial Purpose

An Act 250 permit is required for the construction of improvements for a commercial purpose. 10 V.S.A. § 6081(a)(permit required for development); *id.* § 6001(3)(A)(defining development as construction of improvements for commercial purpose). "Commercial purpose" is defined as "the provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object having value." EBR 2(L). The Petitioners do not dispute that they built the garage to store and maintain vehicles used in the excavation and landscaping business.

Petitioners argue that the construction of improvements for storing and

maintaining vehicles (or by analogy, storing materials in the case of the pole barn) used in a commercial business does not constitute "development" where the primary business activity – landscaping and excavation – does not occur on the Project tract. In support of this argument, Petitioners cite the Board's decision in *Re: George Stump and Joelle King,* Declaratory Ruling #309 (WL 108484), Findings of Fact, Conclusions of Law, and Order (Feb. 29, 1996). The issue in *Stump* was whether a residential storage building and garage that was not built for commercial purposes constituted a substantial or material change to a permitted residential subdivision. *Stump* does not apply in this case.

Nothing in Board precedent or other applicable law indicates that the construction of the garage should not trigger Act 250 jurisdiction merely because the landscaping and excavation activities take place off site. That is the nature of the landscaping and excavation business, but it does not mean that the garage was not built for a commercial purpose. *See Re: Salvas Paving, Inc.*, Declaratory Ruling #229, Findings of Fact, Conclusions of Law, and Order (Jun. 20, 1991)(permit required for construction of improvements for construction and excavation business); *compare*, *Re: Michael Singer*, Declaratory Ruling #257, Findings of Fact, Conclusions of Law, and Order at 3 (Apr. 13, 1992)(professional artist's storage building does not constitute development where no production, employees, signage or customer visits occur or exist on the site). There is no dispute that business activities occur on the Project site: business vehicles and equipment are stored and maintained; excavation and landscaping materials are sifted, sorted and stockpiled; a sign advertising the business is present, and landscaping and excavation customers visit on occasion. There is no question that the garage is used for commercial purposes.

Admittedly, the garage reduced some of the Act 250 impacts of the landscaping and excavation business by placing vehicles, equipment and materials under cover, where they are hidden from view and protected from the elements. This does not mean, however, that no land use permit is required. Act 250 is not intended to bar development, but rather, to minimize its environmental impact and to improve the quality of economic growth. *Southview Associates, Ltd. v. Bongartz,* 980 F.2d 84, 89 (2d Cir. 1992)(citations omitted), *cert. denied,* 507 U.S. 987 (1993). Because Petitioners have constructed improvements for a commercial purpose, an Act 250 permit is required.

V. ORDER

An Act 250 permit is required because the construction of the steel-frame garage for use in the landscaping and excavation business constitutes development.

DATED at Montpelier, Vermont this 23rd day of February, 2005.

ENVIRONMENTAL BOARD

*/s/Patricia Moulton Powden*____
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